TABLE OF CONTENTS.

Opinions Below 1

Jurisdiction 1

The Questions Presented for Review 2

Constitutional Provisions and Statutes Involved in This Case 4

Statement of the Case 5

Argument 9

APPENDIX:

Opinion United States Court of Appeals for the Sixth Circuit 29

Judgment of the United States Court of Appeals for the Sixth Circuit 30

TABLE OF AUTHORITIES.

Cases.

Avrick v. Rockmont Envelope Co., 155 F. (2d) 573 18

Bolling et al. v. Sharpe et al., 347 U. S. 497 13

Burn v. U. S., 287 U. S. 216 (1932) 23

Cadillac Publishing Co. v. Summerfield, Postmaster General, 227 F. (2d) 29, U. S. Ct. Ap. for D. C., June 1955, Cert. Den., Nov. 21, 1955 9

Citizens State Bank of Barstow, Texas v. Vidal, C. C. A. New Mex., 114 F. (2d) 380 11

Currin v. Wallace, Secy. of Agric., 306 U. S. 1 (1939) 13-14

Detroit Bank v. U. S., 317 U. S. 329 (1943) 14

Hoover v. McChesny, 81 F. 472 (1897) 17

Jones v. Carbyn, C. A. Okla., 186 F. (2d) 450 11

Kutcher v. Gray, C. A. D. C., 199 F. (2d) 783 20

Laden v. Crosson, D. C. Pa., 108 Fed. Supp. 240 20

Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682 (1948) 24, 25, 26

McAllister v. Pritchard, 287 Mo. 494, 230 S. W. 66 11

McInnes v. McKay, 127 Maine 110, 141 Atl. 699 11

Meek v. State, 205 Indiana 102, 185 N. E. 899 11

Monongahela R. R. Co. v. U. S., 216 U. S. 177 11

Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287 12

Pennoyer v. Neff, 95 U. S. 714 18

R. R. Retirement Board et al. v. Alton R. R. Co., et al., 55 Sup. Ct. Rep. 758 15

Ray v. Norseworthy, 23 Wall. 128 14

San Jose Ranch Co. v. San Jose Land & Water Co., 126 Calif. 322, 58 Pac. 824 18

Spotts v. B. & O. R. R. Co., 102 F. (2d) 160, 7th C. C. A. (1939) 22

State Bd. of Tax Commissioners v. Chicago, M. St. P. & P. R. R. Co., 121 Ind. App. 302, 96 N. E. (2d) 279 15

State v. Pate, 138 Pac. (2d) 1006, 47 New Mex. 182 12

Steward Machine Co. v. Davis, 301 U. S. 548 (1937) 13

St. Joseph Stockyards Co. v. U. S., 298 U. S. 38 12

Styria, The, v. Morgan, 186 U. S. 1 (1902) 3, 23

Truax v. Corrigan, 257 U. S. 312 (1921) 14

U. S. v. Graham, D. C. Calif., 96 Fed. Supp. 318 11

U. S. v. Morton Salt Co., 338 U. S. 632 (1950) 10, 27

Weinreich v. Franklin Savings & Loan Assn., 27 Ohio Law Abstract 198 19

Wemberley v. Ga. S. & F. Ry. Co., 5 Ga. App. 263, 63 S. E. 29 12

Constitution.

Constitution of the United States:

Fifth Amendment 4, 7, 9, 14, 27

Statutes.

5 U. S. C. A. 1009 ..... 5, 7

5 U. S. C. A. 1009 *et seq.* 5, 9

5 U. S. C. A. 1011 5

28 U. S. C. A. 1254(1) 2

28 U. S. C. A. 1339 8

39 U. S. C. A. 2 ..... 3, 4, 16, 17, 19, 20, 21

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. _____.

VERGIL HEBER SERGEANT, M.D.,

Petitioner,

vs.

W. R. FUDGE, Regional Operations Manager, U. S. Post Office Department, First Regional Office, Cincinnati, Ohio,

and

JOSEPH M. RISLEY, District Manager, 6th District, Post Office Department, Bureau of Operations, Columbus, Ohio,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

OPINIONS BELOW.

The opinion of the District Court, unreported, appears at page 19a of the record, nine extra copies of which are filed herewith. The opinion of the Court of Appeals (1½ printed pages) was delivered and filed on December 18, 1956. Copy of it is appended at page 29, hereto.

JURISDICTION.

The grounds on which the jurisdiction of the Supreme Court is invoked is that the Amended Complaint filed in this case alleges that the *administrative action* complained about was made in violation of the Federal Constitution, and the existence of that allegation was *completely ignored*

in the decision and opinion delivered by the federal court below. Thus, it has departed so far from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision in this particular case. Also the said lower federal court has, in its decision (appended hereto at p. 30) decided important questions of federal law which have never been, but should be, settled by the Supreme Court. It is also contended by this Petitioner that the said federal court below has decided a federal question (concerning a matter "where due process requires that a hearing be had") in a way that is in conflict with applicable decisions of the Supreme Court.

The date of the judgment of the federal court of appeals below was December 18, 1956, and its entry was on the same date. This Court's jurisdiction rests on 28 U. S. C. 1254(1).

THE QUESTIONS PRESENTED FOR REVIEW.

Question No. 1. Isn't it likely to be true in this case that the Constitutional requirement of Due Process of Law has been violated? Petitioner contends that Due Process has been violated *several times*; first, because there has been gross and unjustifiable DISCRIMINATION extended to the Isleta, Ohio post office and its patrons by its discontinuance; second, because Petitioner alleges that he has been deprived of both property and liberty by the said discontinuance; and third, that there *has never been* presented to *any* court, by the defendants, any sworn proofs, or evidence tending to show whether or not the said post office was discontinued because "the efficiency of the service required it," as the U. S. statute concerning discontinuances provides.

Question No. 2. Isn't it likely to be true that the *Administrative Action* taken by the Regional Operations Manager of the Post Office Department, which caused the discontinuance of the post office at Isleta, Ohio, was an *unconstitutional* administrative act, even though the *statute* under which the administrator acted might be *constitutional*? Petitioner, in his Amended Complaint filed in the District Court for Southern Ohio, specifically alleged that the said administrative action *was unconstitutional*, yet the U. S. 6th Court of Appeals, which reviewed the lower court's record in the case, *totally ignored* this very important matter.

Question No. 3. Since the statute concerning the discontinuance of post offices (39 U. S. C. A. Sect. 2) is so vague and indefinite that it leaves "no objective criterion established by the statute" (as said by the 6th CCA, in its opinion), isn't the *statute itself Unconstitutional*?

Question No. 4. Exactly what did Congress mean by the phrase, *"the efficiency of the service,"* as it stands in 39 U. S. C. A. Sect. 2 and as it applies to the discontinuance of post offices?

Question No. 5. Does the Postmaster General and/or his subordinates have any DISCRETION, under the provisions of Title 39 U. S. C. A., Sect. 2, in their discontinuing of a post office "where the efficiency of the service requires such discontinuance"? If he has some discretion under the said law, is not that discretion subject to the terms of the ruling case law on "DISCRETION" (*The Styria v. Morgan*, 186 U. S. 1) which was long ago laid down by the Supreme Court? In what manner, if any, except by a Court Review of the facts, held in all respects strictly under the established rules of Due Process of Law, can it be determined, *in any particular case*, whether or not the Postmaster Gen-

eral's discretion meant a decision of what is just and proper in the circumstances, or whether or not his "discretion" was only a word for hiding his arbitrary will or inconsiderate action?

Question No. 6. This case at bar was dismissed by the District Court solely on its opinion that the Postmaster General was an indispensable party. That question was brought to the Court of Appeals but said court refused to rule on it. In the case at bar an Ohio Regional Operations Manager is the Defendant who actually by himself (as shown by two affidavits filed in this record) issued the order discontinuing the post office at Isleta, Ohio. He is under the jurisdiction of the Ohio court. The affidavits show that he has the power to rescind the discontinuance of any post office in his region, without help from the Postmaster General who is in Washington, D. C. So, in this particular case, the question arises: Is the Postmaster General an indispensable party to the suit? If he is indispensable, plaintiff would have to sue him in the District Court of the District of Columbia.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE.

I. The Fifth Amendment to the U. S. Constitution: "No person shall be * * * deprived of life, liberty, or property without due process of law; * * *."

II. Title 39. The Postal Service; 39 U. S. C. A., Section 2, page 5.

> "*Discontinuing offices.* The Postmaster General may discontinue any post office where the safety and security of the Postal Service and revenues are endangered from any cause whatever, or where the efficiency of the service requires such discontinuance, and he shall promptly certify such discontinuance to

the General Accounting Office. (R. S. Sect. 3864; June 10, 1921, c. 18, Sect. 304, 42 Stat. 24)."

III. The U. S. Administrative Procedure Act, which may be cited as Administrative Procedure Act, Section 10 *et seq.* or as 5 U. S. C. A. Section 1009 *et seq.* Pertinent portions of Section 1009, *supra,* are:

> "(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof. * * * (e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions * * * It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity, * * *"

Section 1011:

> "Nothing in this chapter shall be held to diminish the constitutional rights of any person * * *."

STATEMENT OF THE CASE.

In August 1955, defendant W. R. Fudge, Regional Operations Manager of the Post Office Department, First Region, Cincinnati, Ohio, by virtue of powers delegated to him by regulations of the Postmaster General, issued an order that discontinued the 4th class post office at Isleta, Ohio, on September 30, 1955. He gave no official reasons for such discontinuance at the time, nor has he given any official reasons for it since. He merely said it "was his opinion" that it should be discontinued. Petitioner herein, Vergil Heber Sergeant, M. D. a resident of the Isleta vicinity, and a long-time patron of the Isleta post office,

filed a Complaint, in the U. S. District Court for Southern Ohio, against the said Regional Operations Manager, and his assistant, the District Manager, in which Complaint the said Plaintiff-Petitioner alleged that the Regional Operations Manager, in issuing the discontinuance order "acted in an unjust, unreasonable, arbitrary and capricious manner," and that, if he had any discretion, he "acted with an abuse of discretion." (See paragraphs "7" and "8" of Amended Complaint.) Plaintiff also alleged that said defendant issued the postoffice discontinuance order "solely on the basis of his own, or his assistants' opinions, and that the said Opinions were unsupported by substantial evidence, and were unwarranted by the actual facts." (See paragraph "10" of Amended Complaint.) Plaintiff alleged that said defendant "acted with *arbitrary DISCRIMINATION* toward the Isleta, Ohio postoffice and its 160 patrons, including this plaintiff," and in his Complaint (See paragraph "12" of Amended Complaint) set forth numerous specific reasons why there was *gross DISCRIMINATION*. Plaintiff also alleged (paragraph "16") in his Amended Complaint that defendants' decisions to discontinue the Isleta, Ohio postoffice "were unreasonably arrived at by defendants' personal wills and caprices—by a will to rule without regard to facts—and that defendants acted in bad faith, wilfully, wantonly, deliberately and unreasonably, * * * in utter disregard of the facts and circumstances of the case concerning the ISLETA, OHIO postoffice, and its well-established good service and efficiency rendered at a reasonable cost per capita of its patrons, and Plaintiff further states that their said actions were taken without basis which would lead a reasonable and honest man to such action." Plaintiff *SPECIFICALLY* charged in his Amended Complaint (see paragraph "19" in same) that defendant's order discontinuing the

Isleta, Ohio postoffice was made in direct violation of the Fifth (5th) Amendment to the CONSTITUTION OF THE UNITED STATES OF AMERICA, in that the said order *"has deprived this Plaintiff of his property and property rights without Due Process of Law,* and also has abridged the privileges of this Plaintiff, as a citizen, to receive adequate, safe, and efficient mail service through a local, near-his-home and convenient Postoffice, and has also denied to this Plaintiff the equal protection of the laws in that *UNFAIR DISCRIMINATION* has been applied to the *ISLETA, OHIO* Postoffice and to its patrons, including this Plaintiff, as compared with numerous other small and quite similar postoffices in Ohio which have *NOT* been discontinued but which have been allowed to remain open and functioning as herebefore, although well-known to the said defendant that their per capita costs per patron served were far in excess of the same costs at the said ISLETA, Ohio Postoffice, and their EFFICIENCY of mail services were inferior to those of the Isleta, Ohio Postoffice."

Plaintiff brought his suit under the U. S. Administrative Procedure Act (title 5 U. S. C. A., Sect. 1009), asking that, as provided in said Act, a "due process of law" judicial review be had in the U. S. District Court of Southern Ohio, which would review the administrative action which discontinued the Isleta, Ohio post office. Plaintiff asked the court for an injunction which would restrain the defendants from discontinuing the said postoffice. Because the suit was filed *in Ohio* it was not legally possible to make the Postmaster General one of the parties defendant, since he was located in the District of Columbia.

The defendants filed a motion to dismiss the suit and a hearing was held on said motion in the District Court.

Thereafter the District Court judge DISMISSED the suit giving as his only reason that in his opinion the Postmaster General was an indispensable party to the suit. Plaintiff appealed to the U. S. 6th Court of Appeals in Cincinnati, and filed a (blue-backed) printed, 39-page *"BRIEF OF APPELLANT,"* which contained an Appendix Section (pages 1a to 19a, inclusive) that contained copies of all essential documents that were in the Record. Defendants filed a 3-page, printed *"ANSWER BRIEF OF APPELLEES,"* which contained also a copy of the District Court's verbatim hearings on the Motion to Dismiss and Motion for Temporary Restraining Order. Plaintiff then answered with a (yellow-backed) printed, 17-page *"REPLY BRIEF OF APPELLANT."* Copies of these Appeals Court Briefs are being sent to the Supreme Court along with this PETITION FOR CERTIORARI. An oral argument was made before the U. S. 6th Court of Appeals at Cincinnati by this Petitioner, *in propria persona*, on December 1, 1956. On December 18, 1956 the Appeals Court delivered, and filed, its printed Decision of 1½ pages (see copy of it on page 29). This Petition for Certiorari is now made to the Supreme Court.

Federal jurisdiction in the court of first instance was based on federal and Constitutional questions being involved, and also because: "The district courts shall have original jurisdiction of any civil action arising under any act of Congress relating to the postal service." 62 Stat. 932, June 25, 1948, 28 U. S. C. A. Sect. 1339.

ARGUMENT.

This case asks for judicial review, in accordance with the U. S. Administrative Procedure Act (5 U. S. C. A. Sect. 1009, *et seq.*) of an administrative action taken by a subordinate official of the Post Office Department. Petitioner cites *Cadillac Publishing Co., v. Summerfield, Postmaster General,* 227 F. (2d) 29, U. S. Ct. Ap. for D. C., June 1955, Certiorari Denied, Nov. 21, 1955; See 76 Sup. Ct. 179. From it we quote syllabus No. 3: "Proceedings before Post Office Department are subject to the Administrative Procedure Act. Adm. Proc. Act, section 10 (c); 5 U. S. C. A., Sect. 1009 (c)." From the opinion, page 30: "That proceedings bofore the Department are subject to the Administrative Procedure Act has been settled in *Cates v. Haderlein,* 342 U. S. 804."

The Amended Complaint filed in the case at bar *clearly* makes the claim that the action of the Post Office Department's Regional Operations Manager in discontinuing the post office at Isleta, Ohio was an action in violation of the Fifth Amendment to the federal Constitution. This point was *clearly* brought to the attention of the 6th Circuit Court of Appeals, but the said court deliberately ignored the said allegation, and the arguments concerning it, and made no decision, and expressed no opinion on the said subject. The said court, in an apparently studied and concerted effort to distract attention from the said important allegation in Plaintiff's Amended Complaint, cleverly attempted to side-step the matter by saying in the last paragraph of its decision: "Since the closing of the Isleta post office was in accordance with the statute and since no question relating to the *Constitutionality of the statute itself* (emphasis supplied) has been raised, it follows that this was an action of the sovereign which is

not subject to judicial review and cannot be enjoined. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 704-5 (1948); *Doehla Greeting Cards, Inc., v. Summerfield*, 227 F. (2d) 44 (D. C. Cir. 1955); *Payne v. Fite*, 184 F. (2d) 977 (5 Cir., 1950)."

In *U. S. vs. Morton Salt Co.*, 338 U. S. 632 (1950), the Supreme Court said (on page 644):

> "The Administrative Procedure Act was framed * * * as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights."

On page 640 (*U. S. v. Morton Salt Co., supra*) the Supreme Court said:

> "It is expected that this combination of duty and power [which is vested in federal administrative agencies] always will result in earnest and eager action but it is feared that it may sometimes result in harsh and overzealous actions. To protect against mistaken or arbitrary orders, judicial review is provided. Its function is dispassionate and disinterested adjudication, unmixed with any concern as to the success of either prosecution or defense."

The Supreme Court (in the same case, *U. S. v. Morton Salt Co., supra*) says, on page 642:

> "SPECIFIC CONSTITUTIONAL LIMITATIONS * * * ALSO APPLY TO ADMINISTRATIVE ORDERS, SUCH AS those against self-incrimination, unreasonable search and seizure and DUE PROCESS OF LAW." (Emphasis supplied.)

As has been stated above, this Petitioner clearly and emphatically alleged in his Amended Complaint that the

ORDER issued by the defendants that discontinued the post office at Isleta, Ohio was an administrative order that deprived said Petitioner of his property and property rights without due process of law, and that the said administrative order was, therefore, in violation of specific constitutional limitations.

Many high courts have defined the meaning of "property" and "property rights" as those terms apply to the Fifth Amendment to the federal Constitution. Below are a few of such definitions: " '*Property*' is a nomen generalissimum and extends to every species of valuable right and interest."—*McAllister v. Pritchard,* 287 Mo. 494, 230 S. W. 66, 67; "Word '*property*' in its legal sense means valuable right or interest in thing, rather than thing itself." —*Meek v. State,* 205 Indiana 102, 185 N. E. 899, 901; " '*Property,*' in legal conception, is the total of the rights and powers incident to a thing rather than the thing itself."—*McInnes v. McKay,* 127 Maine 110, 141 Atl. 699, 702; " '*Property*' is a word of very broad meaning, and, when used without qualifications, may reasonably be construed to include obligations, rights and other intangibles, as well as physical things."—*U. S. v. Graham,* D. C. Calif., 96 Fed. Supp. 318, 320; *Jones v. Carbyn,* C. A. Okla., 186 F. (2d) 450, 452; " '*Property*' includes obligations, rights and other intangibles as well as physical things."—*Citizens State Bank of Barstow, Texas vs. Vidal,* C. C. A. New Mex., 114 F. (2d) 380, 382, 383.

The Supreme Court said in *Monongahela R. R. Co. v. U. S.,* 216 U. S. 177:

> "The courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy consistent with the law for acts, whether done by Government or by individual persons, that

violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."

The Supreme Court said in *St. Joseph Stockyards Co. vs. U. S.*, 298 U. S. 38:

"Under the due process clause of the Fifth and Fourteenth Amendments, a distinction has been raised between constitutional rights and privileges accorded by the government, and it has been said that there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it."

In the same case (298 U. S. 38, *supra*) the Supreme Court said:

"The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied and whether the proceedings in which facts were adjudicated was conducted regularly."

The Supreme Court said in *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287:

"It seems that an attempt by statute to make acts of a legislative nature by an administrative body final and conclusive so as to preclude judicial review to establish whether constitutional rights have been infringed would be contrary to due process even though a hearing has been had."

"The word 'discriminate' may be defined as treating one differently from another."—*Wemberley v. Ga. S. & F. Ry. Co.*, 5 Ga. App. 263, 63 S. E. 29 at 31. "If persons under same circumstances and conditions are treated differently, there is 'discrimination'."—*State v. Pate*, 138 Pac. (2d) 1006, 1009, 47 New Mex. 182.

In 1954 the Supreme Court, in *Bolling et al. v. Sharpe et al.*, 347 U. S. 497, said: "Discrimination may be so unjustifiable as to be violative of due process of law." And in the opinion, on page 499, the Court said: "the concepts of equal protection and due process, both stemming from our American ideal of fairness are not mutually exclusive." On the same page (499-500) the Court said: "the term ("liberty") is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."

This Petitioner has stated in his Amended Complaint in this case at bar that the discontinuance of the ISLETA, OHIO post office was not an administrative action which was done for any *proper* "governmental objective." That fact is very clearly alleged in Petitioner's Amended Complaint, and, if Petitioner is *given the opportunity* to present his *evidence and proof* in a reviewing court, Petitioner feels certain that said facts will be made clear and obvious to the reviewing tribunal. Likewise, his evidence and proof concerning *unjustifiable DISCRIMINATION*, as alleged in his Amended Complaint, will also show, to any honest and impartial tribunal, that, as stated by the Supreme Court, *supra*, the discrimination exercised by the administrative agency that discontinued the Isleta, Ohio post office was so unjustifiable that it amounted to violation of due process of law.

The Supreme Court said in *Steward Machine Co. vs. Davis*, 301 U. S. 548, at page 585 (1937): "discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment."

The Supreme Court said in *Currin v. Wallace, Secy.*

of Agric., 306 U. S. 1 (1939) at page 14: "there might be discrimination of such an injurious character as to bring into operation the due process clause of the Fifth Amendment."

The Supreme Court said in *Detroit Bank v. U. S.*, 317 U. S. 329 (1943) at page 337: "discriminatory legislation may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment."

In *Ray v. Norseworthy*, 23 Wall. 128, the court said: "No man is * * * to have his property taken from him by a judicial sentence without the privilege of showing, if he can, that the pretext for doing it is unfounded." The same reasoning as that rule applies to those situations where a man's property and property rights are taken away by an administrative action that purports to be founded upon valid authority for the act. In such a case the person aggrieved by the administrative action MUST have accorded to him the privilege of showing, if he can, that the administrator's pretext for doing the act is unfounded. This privilege of the person aggrieved can only be had by a due process judicial review in a court where proofs, evidence, and cross examinations of witnesses are to be had in strict accordance with the well-established rules of the ancient common law. In the case here at bar that privilege MUST be extended to this Petitioner if *due process of law* is to be observed.

In *Truax v. Corrigan*, 257 U. S. 312 (1921) the Supreme Court said, on page 332:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty,

and property and immunities under the protection of the general rules which govern society—*Hurtedo v. California,* 110 U. S. 516, 535. It of course tends to secure equality of law in sense that it makes a required minimum of protection for every one's right of life, liberty and property which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the laws'."

In *State Bd. of Tax Commissioners v. Chicago, M. St. P. & P. R. R. Co.,* 121 Ind. App. 302, 96 N. E. (2d) 279, 282, the court said:

" 'Arbitrary or capricious action,' on part of an administrative board, means wilful and unreasonable action, without consideration and in disregard of the facts or circumstances of the case, action taken without some basis which would lead a reasonable and honest man to such action."

The Supreme Court said in *R. R. Retirement Board et al. v. Alton R. R. Co., et al.,* 55 Sup. Ct. Rep. 758, syllabus No. 5:

"In determining whether a federal statute contravenes 'due process' guaranty, the guiding principle is that the law shall not be unreasonable, arbitrary, or capricious and that the means selected shall have real and substantial relation to object sought to be obtained. (Constitutional Amendment 5)."

Here is a résumé of the judicial procedure that has taken place in this particular suit here at bar: (1) Petitioner's suit was dismissed by the U. S. District Court; (2) said dismissal was affirmed (see copy of court's decision appended at page 30 of this Petition for Certiorari) by the 6th U. S. Circuit Court of Appeals; (3) Defendants have given NO ANSWER whatsoever to Complaint of

Plaintiff; (4) there has been *absolutely nothing whatsoever,* in the form of proof, evidence, or witnesses, under oath or sworn statements, produced by the Defendants which would tend to show that the post office at ISLETA, OHIO was ordered discontinued because *"the efficiency of the service required such discontinuance."* That condition is required by federal law (Title 39 U. S. C. A. Section 2) before any post office can be *legally* discontinued. There has been *absolutely nothing* produced by Defendants, at any time, in any court, or elsewhere, that could possibly be interpreted that the discontinuance was LAWFULLY made. (5) Plaintiff (who is the Petitioner here) has in his possession abundant evidence which tends to show that the discontinuance of the ISLETA, OHIO post office was an illegal act on the part of the Defendants who are under the District Court's jurisdiction. But Plaintiff has not had any opportunity whatsoever, in a TRIAL AT LAW held under the principles of due process of law, to present his evidence, proofs, or witnesses, nor has he had any opportunity whatsoever to cross examine any opposing witnesses, nor to offer rebuttal to any alleged proof that Defendants might see fit to offer. In fact, Plaintiff has been completely deprived of all opportunity to support, with evidence, in the usual manner that such evidence is presented at trials at law, any of the several allegations that he has made in his Amended Complaint.

Therefore, the Petitioner herein, who is Plaintiff in courts below, contends that, under the circumstances of this particular case, which circumstances have been outlined in the paragraph next above, has been completely denied "due process of law."

If a Postmaster General, or any of his subordinates, can, without a court review of his actions, discontinue any

post office they may select from among the 38,000 post offices that are in the United States, and, regardless of the *real* reason which they may have for their selection, use the pretext that "the efficiency of the service required such discontinuance," then the privileges and rights of the American people are certainly in a sad general "mess"! Furthermore, the federal law that allows them to do such a thing with impunity, is a mockery and a sham, and very likely is also an Unconstitutional law. At any rate, if laws allow such pretexts on the parts of their administrators, it would furnish very good indications that Americans live under a Government which is, in many respects, as tyrannical as is the Government of Russia, a government that, theoretically at least, Americans abhor.

Question No. 3 in this Petition asks whether or not 39 U. S. C. A. Section 2 is an Unconstitutional law. It would certainly appear to be Unconstitutional if its vagueness allows it to be used by administrators as a "cover-up" for any pretext they may wish to make about their actions taken under the said law. Petitioner hopes that the Supreme Court will be able to make a ruling on this Question No. 3. The broad interests of every citizen of the U. S.—all of them use post offices and depend upon them for many essential life services every day—are concerned with the subject, and a ruling should be made upon it NOW.

In *Hoover v. McChesny,* 81 F. 472 (1897), the Circuit Court of Kentucky said: "A citizen of the United States has a property right in the use of the mails for lawful purposes of which he cannot be deprived without due process of law." That decision may be paraphrased as follows: "A citizen of a small Ohio village has a property right in the use of an efficient local post office of which he cannot be deprived without due process of law."

The Supreme Court has said:

" 'Due Process of Law' means a course of legal proceedings according to the rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights." —*Pennoyer v. Neff*, 95 U. S. 714, 733; also 92 U. S. 480; 110 U. S. 516, 536; 154 U. S. 34; 86 U. S. (19 Wall.) 107.

"It is the right of every person before he can be deprived of his property, to have a trial according to law, to have the same character of trial given by the same established rules of evidence and procedure as are applied in other cases under similar conditions." —*San Jose Ranch Co. v. San Jose Land & Water Co.*, 126 Calif. 322, 58 Pac. 824, 825.

In *Avrick v. Rockmont Envelope Co.*, 155 F. (2d) at page 573, the court said:

"An expeditious disposition of cases is a cardinal virtue of the administration of justice, but it is not more important than one's fundamental right to his full day in court * * * we are of the opinion that justice can best be served by a trial of the question on its merits."

There has been no trial of the case here at bar on its merits. The *peculiar facts* of the Isleta, Ohio post office case must be considered in a proper court, under strict due process of law procedure, in order that it may be determined whether or not the Postmaster General and/or his subordinates ordered the discontinuance of the post office at ISLETA, OHIO, either because the "safety and security of the Postal Service and revenues were endangered," or that "the efficiency of the service required the discontinuance." If, upon trial of the case upon its merits, it appears that neither of the above conditions applied to the Isleta, Ohio post office, then the discontinuance was unlawfully made by the officials concerned.

There *must be a trial,* in a court having proper jurisdiction, and with current standards of impartiality, in order to determine whether or not the post office discontinuance order was supported by substantial evidence, or whether or not the said order contained elements of caprice, fraud, or wantonness, or was arbitrary, or palpably wrong under the particular circumstances of the case. Up to this point there has been absolutely no showing whatsoever made by any Post Office Department official that the discontinuance of the ISLETA, OHIO post office was made in accordance with the federal law that applies to such discontinuances (39 U. S. C. A. Sect. 2). The Plaintiff in this case alleges in his Amended Complaint that there were many unlawful elements in the discontinuance order, alleging, among other things charged in the Complaint, that the said discontinuance order was arbitrary, capricious, unsupported by substantial evidence, grossly DISCRIMINATORY, and was made in direct violation of the federal Constitution. So that the TRUTH concerning all the facts of the case will be set forth properly, and in strict accordance with due process of law, a trial upon the merits is absolutely necessary. The Plaintiff who makes the Complaint MUST be given the opportunity to participate in such a trial.

In *Weinreich v. Franklin Savings & Loan Assn.,* 27 Ohio Law Abstract 198, 201, the Ohio Appeals Court said:

> "There should no longer be any question that acts of administrative officers may always be questioned in courts for fraud or gross abuse of discretion. Furthermore, the right is not given to such an administrator to determine as a finality the construction of statutes or the general law as bearing on his administrative duties. These are questions always for the determination of the court."

There have never previously come before any court the questions raised in the case here at bar. These questions concern the federal statute, Title 39 U. S. C. A., Section 2, *supra*, which is the law concerning the discontinuance of post offices by the Post Office Department. There are also collateral questions which are concerned with the administrator's orders that are issued pursuant to that statute. All these are important questions of federal law which have not been, but should be, settled by the Supreme Court of the United States.

In the above-cited "post office discontinuance" statute, there appears this phrase: "the Postmaster General may discontinue any postoffice * * * where the efficiency of the service requires such discontinuance." That phrase is a vague specification and one very hard to define, yet it *should be defined* in precise terms that apply to the particular statute in which it appears. It should not be allowed to remain UN-defined, and thus make it a "catch-all" for any pretexts that administrators might see fit to construe into it.

A search of legal phraseology discloses that there appear to be only two (2) reported cases where the phrase "efficiency of the service" has been court-defined. These are *Kutcher v. Gray*, C. A. D. C., 199 F. (2d) 783, 786 and *Laden v. Crosson*, D. C. Pa., 108 Fed. Supp. 240, 243. Both cases concern the Veterans Preference Act of 1944, and their decisions are of very little, if any, help in this case at bar. In the second case, *supra*, there is some little discussion as to whether the "efficiency" refers to "efficiency in the general organization," or to "efficiency" at some smaller point in said organization. The court decided that it did NOT concern efficiency in the "*general organizations*." Petitioner here believes that the same is true as

regards the phrase "efficiency of the service" as it appears in the 39 U. S. C. A. Sect. 2 statute, the one concerning the discontinuances of post offices. If one will carefully examine the said section it will be observed that when the word "service" is first used in the said section it is spelled "Service," that is with the *letter "S" capitalized.* That undoubtedly refers to the "general organization" of the Postal Service. Then immediately after that there appears this phrase: "*where* the efficiency of the service requires such discontinuance." In this phrase the word "service" is NOT spelled with a capital letter "s." We believe that this is meant to apply to the *individual post office*—the ONE post office where "the efficiency of the service" rendered to the public might possibly "require discontinuance." This belief is given added weight by the fact that most small post offices only cost the Post Office Department a few hundred dollars per year to operate them and to render personal services to their local village patrons, while every year the "general organization"—that is the Post Office Department itself—goes into "the red ink" with losses of *hundreds of millions of dollars.* This has always been true, and it is utterly impossible to get the "general organization" out of "the red" by the *pretext* of "saving" a few hundred dollars a year at widely scattered small villages. In many cases when a small village post office such as ISLETA, OHIO is discontinued, its previous "revenues" are transferred to the credit of the ADJOINING VILLAGE POST OFFICE where, almost immediately, those transferred "credits" are made the basis for raising the salaries and other costs of the personnel employed there, and oftentimes the small extra credit thus obtained makes it possible for the ADJOINING VILLAGE post office to create *a new job,* and add a new

employee whose salary will be *several times as much* as the total post office costs were at the smaller discontinued post office. Meanwhile the patrons of the discontinued post office have been ROBBED by their government. That is the situation at the village of ISLETA, OHIO, the one concerned in the case at bar. It should cause shame on the part of those Government officials that perpetrated the situation.

A case that may be of help in formulating a legal definition of the phrase, "the efficiency of the service," is *Spotts v. B. & O. R. R. Co.*, 102 F. (2d) 160, 7th C. C. A. (1939). Syllabus No. 6 says: " 'Efficient' means adequate in performance or producing properly a desired effect. 'Inefficient' means not producing or not capable of producing the desired effect, incapable, incompetent, or inadequate." Page 163 of the opinion in same case: "the Commission * * * has included no specific requirements and fixed no standard as filling the demands of 'efficiency'." In said case a *JURY*, after hearing evidence, decided whether there had been "efficiency" or "inefficiency." The same method should be used in determining whether or not there is "efficiency" or "inefficiency" in the operation of a post office, if the statute itself, or a Supreme Court decision on the subject, does not set forth "objective criterion" in any details whatsoever.

Petitioner herein contends that unless a strict showing can be made in a reviewing court, that the discontinuance of a post office was really and truly made because the *"efficiency of the service"* at the said post office *"required* such discontinuance" then the act of ordering its discontinuance was illegal, and it should be set aside and made null and void by the courts.

One of the questions that was presented, in the case here at bar, to the 6th Circuit Court of Appeals, was that

concerning whether or not the Postmaster General has any DISCRETION when ordering the discontinuance of a post office. It does not appear in the Circuit Court's printed decision that said court answered said question. The court did say this: "It leaves the decision as to whether efficiency requires the closing of a post office solely to the judgment of the Postmaster General and his designated agents." Does that mean that there is "DISCRETION"? If there be discretion, that discretion should conform strictly to the ruling decision of the Supreme Court which was *The Styria v. Morgan,* 186 U. S. 1 (1902), where it is said on page 9:

> "The good faith of the master and his reasonable exercise of discretion *must be considered and determined in the light of the facts in each particular case.* [Italics supplied.] The term 'discretion' implies the absence of a hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of *discretion,* and yet discretion should not be a word for arbitrary will or inconsiderate action. 'Discretion' means a decision of what is just and proper in the circumstances."

In *Burn v. U. S.,* 287 U. S. 216 (1932), the Supreme Court said, on page 223:

> "The question * * * whether there has been an abuse of discretion * * * is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action * * *. It takes account of the law and the particular circumstances of the case and is directed by the reason and conscience of the judge to a just result."

In the case at bar here the decision of the 6th Circuit Court of Appeals (see copy of printed decision at page 30 of this Petition) said:

"since no question relating to the *Constitutionality of the statute itself* (emphasis supplied) has been raised, it follows that this was an action of the sovereign which is not subject to judicial review and cannot be enjoined. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 704-5 (1948); *Doehla Greeting Cards Inc. v. Summerfield*, 227 F. (2d) 44 (D. C. Cir., 1955); *Payne v. Fite*, 184 F. (2d) 977 (5th Cir., 1950)."

There are *fifty (50) pages* of printed opinion in the *Larson*, 337 U. S. 682-732 case, *supra*. The opinion is filled with numerous conflicting decisions and comments concerning them. Most of them have no parallel with the circumstances alleged in the Amended Complaint of the case here at bar, and therefore do not apply to it in any way. Also the *Larson* (337 U. S. 682-732) case itself is one that is *entirely distinguished* from the case here at bar because in said *Larson* case (see page 691 of opinion): "There was no claim made that the Administrator and his agents, etc., were acting unconstitutionally or pursuant to an unconstitutional grant of power." And on page 703 of opinion: "There is no allegation of any statutory limitation on his (i.e. the Administrator's) powers * * *. There is no claim that his action constituted an unconstitutional taking." The above quoted phrases, in the *Larson* case, *supra*, plainly show that said case is entirely distinguished from the case here at bar, for in this case here at bar, it is plainly alleged in paragraph "9" of the Amended Complaint that the Regional Operations Manager of the Post Office Department "acted in excess of statutory authority and short of statutory right." And in paragraph "19" of the same Amended Complaint it is plainly alleged that "the action taken * * * which ordered the discontinuance of the Isleta, Ohio post office * * * was made in direct

violation of the Fifth (5th) Amendment to the CONSTITUTION OF THE UNITED STATES OF AMERICA, in that the said order *has deprived this Plaintiff of his property and property rights without Due Process of Law,* and also has abridged the privileges of this Plaintiff, as a citizen, to receive adequate, safe, and efficient mail service through a local, near-his-home and convenient post office, and has also denied to this Plaintiff the equal protection of the laws in that *UNFAIR DISCRIMINATION* has been applied to the ISLETA, OHIO Postoffice and to its patrons, including this Plaintiff, as compared with numerous other small and quite similar post offices in Ohio which have *NOT* been discontinued but which have been allowed to remain open and functioning as herebefore, although well-known to the said defendant that their per capita costs per patron served were far in excess of the same costs at the said ISLETA, OHIO post office, and their EFFICIENCY of mail services were inferior to those of the Isleta, Ohio post office."

In view of the above *distinguishing factors* between the *Larson* case and the case at bar, we only set forth here those pertinent portions of the *Larson* opinion which do apply to the case at bar. These are:

Page 723: " 'Sovereign immunity' carries an august sound. But very recently we (the Supreme Court) recognized that the doctrine is in 'disfavor.' *Federal Housing Administration v. Burr,* 309 U. S. 242, 245." Page 724: "the policy behind the immunity of the sovereign from suit without its consent does not call for disregard of a citizen's right to pursue an agent of the government for wrongful invasion of a recognized legal right."

Still quoting from the *Larson* (337 U. S. 682-732) case *supra,* on page 704 we read: "Under our constitu-

tional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions." So said the Supreme Court of the U. S., and that is the settled law of the land, and *it applies to the case here at bar.*

On pages 701-702 of the *Larson* case, *supra*, the Supreme Court said:

> "an allegation that the actions of Government officers are wrongful under general law is sufficient to show that they are 'unauthorized' * * * we [the Supreme Court] adhere to the rule which has been frequently repeated by this Court * * *: the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers, or, if within those powers, only if the powers, or *their exercise in the particular case* [italics supplied] are *constitutionally void.*"

The application of the above principle to the case here at bar is clear; Petitioner's Amended Complaint alleges that the action of the Regional Operations Manager in discontinuing the Isleta, Ohio post office was wrongful under the law and the Constitution. That (see *supra*) is sufficient to show that the said action was "unauthorized." *That permits a suit for specific relief against the said official*—and it follows the above-quoted "principle which has been frequently repeated by this (Supreme) Court." It, therefore, follows that the 6th U. S. Circuit Court's opinion in the case at bar which said "this was an action of the sovereign which is not subject to judicial review

and cannot be enjoined" is an *erroneous* opinion, and is one that calls for an exercise of the Supreme Court's power of supervision. The same decision of the said 6th Appeals Court is also a decision on a federal question in a way in conflict with applicable decisions of the Supreme Court, and calls for a review on Writ of Certiorari.

As stated above in this Petition for Certiorari, there was *concerted silence* in its decision on the part of the 6th U. S. Circuit Court of Appeals, about Plaintiff's plainly alleged claim that the *action* of the Post Office Department's Regional Operations Manager was an *action* made in direct violation of the Constitution's Fifth Amendment. Much as the said 6th Circuit Court side-steps this important factor in the case at bar, Petitioner herein insists that it is the *ABSOLUTE* bench-mark from which the entire case must be surveyed by the Supreme Court.

We repeat, for emphasis, what the Supreme Court said in the case of *U. S. vs. Morton Salt Co.*, 338 U. S. 632, *supra*, at page 642: "Specific constitutional limitations also apply to administrative orders such as * * * due process of law." That Supreme Court ruling makes it clear and obvious that the specific constitutional limitation of due process of law applies to the order which discontinued the post office at ISLETA, OHIO. This Petitioner asserts that the said order caused this Petitioner to be deprived of property and property rights without due process of law, *and* that the said order caused DISCRIMINATION which was so *unjustifiable* as to be violative of due process of law, *and* that, furthermore, there also will never be due process of law in the *proceedings* of this case at bar unless and until this Petitioner is given the legal opportunity to present evidence and proofs, in the proper court, and to cross-examine the Defendants

who issued the administrative order that discontinued the Isleta, Ohio post office.

WHEREFORE, this Petitioner prays that the Supreme Court grant a Writ of Certiorari in order that justice may be done.

Respectfully submitted,

VERGIL HEBER SERGEANT,

Petitioner, In Propria Persona.

March 1957.

MAIL ADDRESS: P. O. Box No. 63, Newcomerstown, Ohio.

APPENDIX.

OPINION UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed December 18, 1956.)

Before SIMONS, Chief Judge, MCALLISTER and STEWART, Circuit Judges.

PER CURIAM. This appeal is from the district court's dismissal of a suit to enjoin a Regional Operations Manager of the United States Post Office Department from discontinuing a post office in Isleta, Ohio. Isleta is a village of approximately 160 persons, who have been receiving mail through rural delivery since the closing of the post office. The ground of dismissal was that the Postmaster General, whom the appellant failed to make a defendant, was an indispensable party to the action.

Without reaching the issue of whether the Postmaster General was an indispensable party, cf. *Callow v. Lehmann*, 233 F. (2d) 859 (6 Cir., 1956), we are of the opinion that the order of the district court must be affirmed.

Title 39 U. S. C. A., § 2 authorizes the Postmaster General to discontinue any post office "* * * where the efficiency of the service requires * * *". There is no objective criterion, such as amount of mail handled or dollar volume of business, established by the statute. It leaves the decision as to whether efficiency requires the closing of a post office solely to the judgment of the Postmaster General and his designated agents. The discontinuance of the post office was a matter clearly within the authority of the statute, no matter how unwise the action may have been. *Adams v. Nagle*, 303 U. S. 532, 541-43 (1938). Compare *Hannegan v. Esquire, Inc.*, 327 U. S. 146 (1946).

We are not faced here with executive action in the nature of a penal sanction, like barring of certain matter

from the mails, where due process requires that a hearing be had. *Walker v. Popenoe*, 149 F. (2d) 511, 513 (D. C. Cir., 1945).

It is not hard to imagine the chaos which would result if all authorized acts of government executive officers could be restrained merely because a court believed them to be ill advised. Since the closing of the Isleta post office was in accordance with the statute and since no question relating to the Constitutionality of the statute itself has been raised, it follows that this was an action of the sovereign which is not subject to judicial review and cannot be enjoined. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 704-5 (1948); *Doehla Greeting Cards, Inc. v. Summerfield*, 227 F. (2d) 44 (D. C. Cir., 1955); *Payne v. Fite*, 184 F. (2d) 977 (5 Cir., 1950).

The judgment of the district court is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed December 18, 1956.)

Before SIMONS, *Chief Judge*, MCALLISTER and STEWART, *Circuit Judges.*

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ POTTER STEWART,
United States Circuit Judge.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute Involved	2
Statement	3
Argument	3
Conclusion	5

CITATIONS

Cases:

Alabama Power Co. v. *Ickes*, 302 U.S. 464	4
Carter v. *Forrestal*, 175 F. 2d 364, certiorari denied, 338 U.S. 832	3
Doehla Greeting Cards v. *Summerfield*, 227 F. 2d 44	3, 4
Frothingham v. *Mellon*, 262 U.S. 447	4
Hargett v. *Summerfield*, (C.A.D.C.) (No. 13,169, decided March 21, 1957)	4
Harper v. *Jones*, 195 F. 2d 705, certiorari denied, 344 U.S. 821	3
Larson v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682	4
Michaelson v. *Herren*, (C.A. 2) (No. 24,311, decided March 13, 1957)	4
Payne v. *Fite*, 184 F. 2d 977	4
Smart v. *Woods*, 184 F. 2d 714	4
Transcontinental and Western Air v. *Farley*, 71 F. 2d 288, certiorari denied, 293 U.S. 603	3
Ware v. *United States*, 4 Wall. 617	3
Williams v. *Cravens*, 210 F. 2d 874, certiorari denied, 348 U.S. 819	3

Statutes:

Administrative Procedure Act, Section 10, 60 Stat. 243, 5 U.S.C. 1009	4
39 U.S.C. 2	2

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 836

VERGIL HEBER SERGEANT, PETITIONER

v.

W. R. FUDGE, REGIONAL OPERATIONS MANAGER, U. S. POST OFFICE DEPARTMENT, FIRST REGIONAL OFFICE, CINCINNATI, OHIO

and

JOSEPH M. RISLEY, DISTRICT MANAGER, 6TH DISTRICT, POST OFFICE DEPARTMENT, BUREAU OF OPERATIONS, COLUMBUS, OHIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio (R. 19) is not reported. The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 29-30) is reported at 238 F. 2d 916.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1956 (Pet. App. 30). The petition for a writ of certiorari was filed on March 14, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the Postmaster General's decision to discontinue a post office may be judicially reviewed.

STATUTE INVOLVED

39 U.S.C. 2 provides as follows:

> *Discontinuing Offices.* The Postmaster General may discontinue any post office where the safety and security of the Postal Service and revenues are endangered from any cause whatever, or where the efficiency of the service requires such discontinuance, and he shall promptly certify such discontinuance to the General Accounting Office.

STATEMENT

Petitioner instituted this action against the respondents, who are regional and district managers of the United States Post Office Department, to restrain them from discontinuing the post office at Isleta, Ohio, a village of approximately 160 persons who have been receiving mail through rural delivery since the closing of the post office (Pet. App. 29). The Postmaster General was not joined as a party-defendant. Petitioner alleges that his interest in restraining the closing of the post office is as "a patron of said Postoffice for sixty (60) years" (R. 11).

Respondents moved to dismiss the complaint on the grounds (1) that the Postmaster General was an indis-

pensable party, and (2) that the discontinuance of a post office was a discretionary function not subject to judicial review. The District Court granted the motion on the first ground without passing on the second. On appeal to the Court of Appeals for the Sixth Circuit, that court affirmed on the second ground without passing on the first.

ARGUMENT

1. This suit attempts to restrain an act which Congress has entrusted to the discretion of the executive branch. It is well settled that the courts may not interfere with this discretion when so entrusted. *Doehla Greeting Cards* v. *Summerfield,* 227 F. 2d 44 (C.A. D.C.); *Transcontinental and Western Air* v. *Farley,* 71 F. 2d 288 (C.A. 2), certiorari denied, 293 U.S. 603; *Harper* v. *Jones,* 195 F. 2d 705 (C. A. 10), certiorari denied, 344 U.S. 821; *Williams* v. *Cravens,* 210 F. 2d 874 (C.A. D.C.), certiorari denied, 348 U.S. 819; *Carter* v. *Forrestal,* 175 F. 2d 364 (C.A. D.C.), certiorari denied, 338 U.S. 832. As the Court of Appeals stated in its *per curiam* opinion:

> It is not hard to imagine the chaos which would result if all authorized acts of government executive officers could be restrained merely because a court believed them to be ill advised.

As early as 1866, this court spoke of the "discretion" which Congress had given to the Postmaster General in empowering him to discontinue a post office, and added that as he had exercised his discretion, "it is not possible to hold that the discontinuance was unlawful." *Ware* v. *United States,* 4 Wall. 617, 633-634.

Contrary to petitioner's contention (Pet. 9), the Administrative Procedure Act does not change this result.

Section 10 of the Act, entitled "Judicial review of agency action", specifically provides for review "except so far as * * * agency action is by law committed to agency discretion. * * *" 60 Stat. 243, 5 U.S.C. 1009. See also, *Hargett* v. *Summerfield,* (C.A. D.C.) (No. 13,169, decided March 21, 1957); *Michaelson* v. *Herren,* (C.A. 2) (No. 24,311, decided March 13, 1957) (concurring opinion).

2. Because the foregoing basis for the decision is so clearly correct, other equally patent grounds requiring the same result need only be mentioned:

Since the relief sought would restrain the formal exercise of the authority granted by the statute to the Postmaster General, he is an indispensable party. *Payne* v. *Fite,* 184 F. 2d 977 (C.A. 5); *Doehla* v. *Summerfield, supra*; cf. *Smart* v. *Woods,* 184 F. 2d 714 (C.A. 6).

Also, as this suit attempts to control and direct the carrying out of policies of the United States in respect to postal services, it is in substance and in fact a suit against the United States. As it has not consented to be sued, such a suit is not maintainable in its courts. *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682; *Payne* v. *Fite, supra*; *Doehla Greeting Cards* v. *Summerfield, supra.*

Furthermore, plaintiff's interest as a patron of the Isleta, Ohio, Post Office is not a legal interest sufficient to give him standing to sue. Cf. *Frothingham* v. *Mellon,* 262 U.S. 447; *Alabama Power Co.* v. *Ickes,* 302 U.S. 464.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
HERSHEL SHANKS,
Attorneys.

APRIL 1957.

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